IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

IN RE	)	
	)	**NO. 3-83-00372**
SOUTHERN INDUSTRIAL BANKING CORPORATION	)	**Chapter 11**
	)	
Debtor	)	

M E M O R A N D U M

This case came to be heard upon ETB Corp.'s motions to compel regarding orders relating to compensation for professional fees and expenses and for other relief filed April 28, 1993, and June 1, 1993. Following the hearing the Liquidating Trustee and ETB Corp. ("ETB") filed supplemental memoranda.

At the hearing, the court expressed its concern that it appeared the Trustee's attorneys had failed to comply with the terms of Order No. 409 entered on April 29, 1992, by their failure to file quarterly fee applications. Order No. 409 provided that the procedure for compensation of professionals in place prior to the entry of Order No. 360 would be resumed from and after January 9, 1992. ETB argued that the fee application procedure prior to Order No. 360 was set forth in Order No. 108. That order authorized the Liquidating Trustee to retain the firms of Bernstein, Susano, Stair & Cohen ("Bernstein, Susano") and Frantz, McConnell & Seymour ("Frantz, McConnell") and provided that the attorneys would submit quarterly applications seeking compensation which would set forth the nature of the work performed, the time devoted

to the task, the applicable charges, the amounts previously billed and paid and any amount for which payment was sought, as well as expenses.

Because three of the Trustee's other law firms did not submit quarterly applications during 1992, and because there was no challenge to ETB's assertion that Order No. 108 set forth the prior application procedure for all the Trustee's attorneys, the court was left with the impression at the hearing that Order No. 409 had been violated.[1] The Trustee's supplemental memorandum points out, however, that Order No. 108 did not govern the application procedure for Hunton & Williams, Patrick, Beard & Samples, P.C. ("Patrick, Beard") and Farris, Warfield & Kanaday ("Farris, Warfield"). Order No. 123, authorizing the employment of Hunton & Williams, incorporates the procedure set forth in the application. That procedure was described in the application as follows:

> Monthly statements when approved by the Trustee shall be paid by the Trustee at the rate of 100% of expenses and 90% of the fees billed and approved. It is contemplated that the attorneys will submit quarterly applications to the Bankruptcy Court. . . .

The order and application authorizing the retention of Patrick, Beard is substantially the same. Hence, these orders of retention did not specifically require that quarterly applications be filed.

[1] A number of judges have over the years handled proceedings in the SIBC bankruptcy case. Given the volume of papers filed and the number of orders entered by different judges in this case in the last ten years, assistance of counsel is particularly important in locating the relevant court orders and papers which might pertain to a particular hearing or motion.

When Farris, Warfield was retained, Order No. 360 governed the fee procedure and it was paid 100% of its fees until Order No. 409 was entered. Thus, when Order No. 409 was entered, there was no prior procedure applicable to that firm.

The Trustee also points out that before the fee application procedure was modified by Order No. 360, Hunton & Williams and Patrick, Beard submitted periodic applications on other than a quarterly basis between 1986 and 1989. At no time during this period did the court or any party voice objection to this procedure.

When Order No. 409 was entered, the only two firms that had previously been required to file quarterly applications were Bernstein, Stair and Frantz, McConnell. After the entry of Order No. 409, Bernstein, Stair and Frantz, McConnell resumed filing quarterly applications. The other firms did not file quarterly applications because the prior procedure in place before Order No. 360 did not require them to do so.

On November 9, 1992, ETB filed an objection to the pending fee applications of Bernstein, Stair and Frantz, McConnell. It did not object that the other firms were not filing every quarter nor did it allege that the failure to file every quarter was a violation of Order No. 409. Rather, its objection was that the applications were not all filed simultaneously.

At a hearing on November 24, 1992, the court stated it preferred that all future applications be filed by a given date so that one hearing could be held to consider all pending fee applications. Such a procedure would thereby allow a meaningful review of the applications to guard against duplication of services. J. Thomas Jones, one of the Trustee's attorneys who attended the November 24 hearing, was directed to coordinate among all of the Trustee's counsel a procedure by which quarterly fee applications would be filed at the same time and to incorporate such a procedure into a proposed order. Because of a disagreement among the Trustee's counsel and ETB's counsel over the contents of the proposed order, such an order was never finalized. Nevertheless, Mr. Jones attempted to coordinate the filing of fee applications so that all the applications would be brought current through the year end 1992 and filed simultaneously.

By February 12, 1993, all of the Trustee's other law firms had submitted their applications to Mr. Jones. Mr. Jones has stated, however, that because of concerns about preserving the attorney-client and work product privileges, redrafting of the applications was necessary and this was communicated to the other firms by a letter from Mr. Jones dated February 26, 1993. Thereafter, Mr. Jones received revised applications from Hunton & Williams and Patrick, Beard on March 12, 1993; from Frantz, McConnell on March 25, 1993; and from Farris, Warfield on April 30, 1993. He then

filed and served these fee applications, together with his own firm's fee application, on May 3, 1993.

Considering the record in this case together with the explanation offered by the Trustee concerning the reason for the delay in filing the fee applications, the court does not believe the circumstances warrant the imposition of sanctions.[2] Accordingly, the court will deny ETB's request that the court order disgorgement of fees or removal of the attorneys.

In reviewing the fee procedures in this case, however, the court does believe the terms of future interim payment of the Trustee's attorneys should be changed and that a more substantial holdback be implemented until the court can rule upon the fee applications and objections thereto. Such a change in procedure takes into account that a significant amount of the type of legal work now being performed by the Trustee's attorneys has changed since the Trust was originally established. In years past, there was no dispute concerning the propriety of the legal work being

[2] Order No. 409 also states "that all quarterly applications and the final application submitted by professionals for compensation shall be served upon ETB Corp. and any other parties in interest requesting same." Although ETB argues this provision makes clear that all the Trustee's law firms were ordered to submit applications on a quarterly basis, the court cannot so find in light of the other provision of the order that reinstates the procedure for compensation in place prior to the entry of Order No. 360. The Trustee has demonstrated both by the language of previous orders and past practice that the fee appli- cation procedure in place prior to Order No. 360 did not require the filing of fee applications on a quarterly basis by all the Trustee's law firms. At best, Order No. 409 is ambiguous concerning the timing of the filing of fee applications for all of the Trustee's attorneys. The ambiguity in the order and ETB's concern that fee applications were not being filed timely could have been addressed much earlier had the matter been brought to the court's attention during 1992. Instead, ETB waited approximately one year after the entry of Order No. 409 to question the timing of the fee applications.

performed for the benefit of the Trust. Now, however, ETB contends that Trust moneys should not be used to finance litigation against it by the Trustee. These objections by a beneficiary of the Trust should be resolved before 90% of fees are automatically paid by the Trust to finance the current pending litigation.

Given the nature and expense of the recent litigation commenced in this case, and the amount of fees already paid to the Trustee's law firms that have not to date been approved, the court believes that henceforth the Trustee should pay only 40% of the fees billed until the court can rule on the quarterly fee requests. Also, as the Trustee receives and pays the monthly invoices submitted by his attorneys, he shall immediately file with the court and serve on counsel for ETB, counsel for the Committee of Contingent Interest Certificate Holders ("Committee"), and the United States Trustee a statement setting forth the amount of fees billed and the amount of fees paid to each law firm. This procedure will allow the court to monitor on a monthly basis the amount of fees being paid pursuant to the 40% holdback procedure. The court may decide at any time in the future to either increase or decrease the holdback.

Turning now to the other issues raised regarding the adequacy of the fee applications, ETB complains the applications are not supported by itemized statements of services thus precluding a meaningful review. The Trustee makes a blanket claim that disclosure of the statements of itemized services would disclose privi-

ledged attorney-client information and attorney work product information. The Trustee requests the court to implement a procedure to shield such information from ETB. The itemized statements have been disclosed to the U.S. Trustee.

The court agrees with ETB that any attorney-client privilege was waived when the itemized statements were disclosed to the U.S. Trustee, a third party. *United States v. American Tel. & Tel. Co.,* 642 F.2d 1285 (D.C. Cir. 1980); 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2016 (1970). Hence, the attorney-client privilege is inapplicable to the itemized statements supporting the pending fee applications.

As to the claim of attorney work product, a disclosure of a document to a third person does not waive the work product immunity unless it has substantially increased the opportunities for potential adversaries to obtain the information. *Stix Prods. v. United Merchants & Mfrs.*, 47 F.R.D. 334 (S.D.N.Y. 1969); 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024 (1970). The disclosure made to the U.S. Trustee does not substantially increase the opportunity for ETB to obtain the information.

Even though a particular document or thing may be covered under the work product doctrine, this does not mean it is forever shielded from discovery. It will still be ordered produced if the party seeking disclosure can make a sufficient showing of neces-

sity. 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2025 (1970).

The court has not yet been provided with the itemized statements of services at issue. ETB argues such statements cannot be the subject of the work product doctrine because the statements were not prepared in anticipation of litigation. The court disagrees. It has been held that attorney fee vouchers may reveal strategies developed by counsel in anticipation of or preparing for litigation and that such communications are subject to the attorney work product doctrine. *Indian Law Resource Ctr. v. Department of Interior*, 477 F. Supp. 144, 148 (D.D.C. 1979). This, however, does not solve the problem facing the court.

Although a party to a lawsuit would not be entitled to discover the other party's attorney fee statements that detail attorney services during the course of litigation, itemized statements of services must be submitted to support an interim fee application in a bankruptcy case and in this case. Fee applications, of course, are subject to notice and hearing so that interested parties may be heard regarding the propriety of the fee request. Before a party can properly evaluate a fee application, it needs to examine an itemized statement of services supporting the application. Hence, the court is faced with attempting to accommodate both the interests of the attorney work product doctrine in connection with the pending adversaries and the interests of a full, complete, and fair hearing on the fee applications.

To accommodate these interests, the court will allow the Trustee's attorneys twenty days to file both a redacted and complete statement of services supporting their fee applications. The complete statement of services shall be filed under seal and the redacted statement of services shall be filed and served on counsel for ETB and counsel for the Committee. Unless the Trustee's attorneys reasonably believe that disclosure of a particular entry will somehow prejudice the Trustee in conducting the pending litigation, redaction should not be made. An affidavit or affidavits should be submitted for *in camera* review that explains why disclosure of any redacted material would prejudice the Trustee. In making any redactions, the Trustee's counsel should heed the advice contained in *In re CF & I Fabricators,* 131 B.R. 474 (Bankr. D. Utah 1991) that extreme care should be taken when redacting portions of the itemized statements since deletions must not eliminate entries that should reasonably appear on public applications. *Id.* at 487. After the court has had the opportunity to review this material, it will decide whether any or all of the redacted material should be disclosed.

A similar procedure shall be followed for future itemized statements the Trustee contends are subject to either the attorney-client privilege or work product doctrine. In each instance, an affidavit or affidavits should be filed for *in camera* review that explains the basis for the redacted entries.

If the court ultimately awards interim compensation based in part on redacted material, such an award will, of course, be subject to a final review and hearing after the litigation in this case has been concluded and no further reason exists for keeping portions of the itemized fee statements confidential.

An order will enter in accordance with this memorandum that addresses the matters discussed herein and disposes of the other matters that were the subject of the hearing conducted on July 8, 1993.

JOHN C. COOK
United States Bankruptcy Judge